1951

Benjamin B. Alward v. R. E. Green dba National School Assemblies : Plaintiff-Brief of Appellant

Utah Supreme Court

Jack R. Decker; Glen E. Fuller; Attorneys for Plaintiff-Appellant;

7649

In the Supreme Court of the State of Utah

BENJAMIN B. ALWARD,
Plaintiff-Appellant,

vs.

R. E. GREEN, doing business as NATIONAL SCHOOL ASSEMBLIES,
Defendant-Respondent.

No. 7649

PLAINTIFF-APPELLANT'S BRIEF

JACK R. DECKER,
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NATURE OF THE CASE

The appellant, Benjamin B. Alward, who resides at 148 First Avenue, Salt Lake City, Utah, hereinafter designated as the plaintiff, brought this action to recover from the respondent, R. E. Green, doing business as National School Assem-

blies, hereinafter designated as the defendant, the sum of Nine Thousand ($9,000.00) Dollars, plus interest and costs, by reason of an alleged breach of contract which had existed between them.

The defendant is a non-resident natural person living in Los Angeles, California. In order to secure jurisdiction of his person the plaintiff served summons upon one of the defendant's alleged agents in conformance with then existing Sections 104-5-11(10) and 104-3-26.10, Utah Code Annotated, 1943, which provided the procedure for securing jurisdiction of non-resident persons doing business within the state of Utah.

Plaintiff first served one of defendant's alleged agents with summons in case No. 85736 in the Third District Court of Salt Lake County on March 31, 1949. Defendant thereafter appeared specially and moved the court to quash service of summons on the ground that the defendant was not subject to the jurisdiction of the Utah court within the purview of the aforementioned sections of our law. After a complete hearing the court, Hon. Joseph G. Jeppson presiding, overruled defendant's motion to quash service of summons, signed findings of fact and conclusions of law and ordered defendant to appear and plead in the action.

Soon thereafter the defendant succeeded in re-opening the matter upon discovery that the time and place of service was not endorsed upon the copy of the summons given defendant's agent and successfully persuaded the court to reverse its position. The motion to quash was then granted defendant. This was done upon the strength of the case of *Thomas v.*

District Court of Third Judicial District in and for Salt Lake County, 110 Utah 245, 171 P. 2d 667.

Plaintiff then made a second service upon another alleged agent at a later date, but voluntarily dismissed the entire action upon learning that another technicality would bar him inasmuch as summons hadn't "issued" (been placed in the hands of a proper person for purposes of service—former Section 104-5-5; now Rule 4 (a) and (b), Utah Rules of Civil Procedure) within the three-month period allowable.

Thereupon a new complaint was filed and a new action was commenced in the same court, No. 88052 (the case at bar), and plaintiff proceeded to make proper service on yet another of defendant's alleged agents. This third service was made on January 16, 1950.

Once again the defendant appeared specially to quash the service on the grounds of lack of jurisdiction of the person of the defendant in accordance with Rules 4 (e) (10) and 17 (e), Utah Rules of Civil Procedure—which had by then replaced Sections 104-5-11.10 and 104-3-26.10. After a hearing on the matter the court, Hon. Albert H. Ellett presiding, decided in favor of the defendant, thus creating two contrary rulings on basically the same set of facts.

On December 29, 1950 (R. 25) the court signed an Order quashing the service of summons, in substance as follows:

> " . . . IT IS HEREBY ORDERED that the service of summons upon the defendant in this action be, and is, quashed, annulled and set aside for lack of jurisdiction of the person of the defendant."

It was from the foregoing Order that the plaintiff petitioned the Supreme Court of the State of Utah for an Order granting an intermediate appeal, and on February 19, 1951 this court granted an appeal.

FACTS OF THE CASE

The facts of the case as brought out on the hearings and which defendant will undoubtedly agree to be so except insofar as they involve any commitment by him jeopardizing his position in a trial on the merits of the case are as follows: The defendant operates an organization which supplies artists and attractions for the purpose of giving performances, primarily to schools, throughout the western United States. These programs are presented by talent furnished by the defendant under the terms of contracts which he makes with the various schools. In order to fulfill these contracts the defendant enters into contracts of a different nature with a group of approximately twenty or more artists, of which the plaintiff was one, to give such performances as and when scheduled.

The plaintiff and the defendant signed a contract (R. 3-4) on February 10, 1947, whereby plaintiff was to give performances to school assembly programs on *"Australia,"* consisting of a lecture illustrated with colored motion pictures, as directed. The contract was to expire on June 1, 1950, at the end of the school year 1949-50. The plaintiff was booked to perform in many schools in several states, including "nearly every school in Utah." (Ex. C.)

Plaintiff had fulfilled a regular week's performances as scheduled on a Friday afternoon in the latter part of January, 1949, the year of the "big winter." He was in eastern Oregon at the time and was proceeding to travel eastward via Soda Springs, Idaho, in order to reach the state of South Dakota. The distance involved necessitated continuous travel in order that he be in South Dakota in time to give scheduled performances the following Monday morning. He traveled by automobile.

At Burley, Idaho, he was advised (Exh. A-A, p. 9) that roads to the east were snowbound and that he should travel eastward via Ogden (Weber canyon). However, upon reaching Snowville, Utah, he encountered a blizzard which continued southward at least as far as Salt Lake City. Due to the weather conditions he did not attempt to travel through Weber canyon but came into Salt Lake City, where he became snowbound for some twelve to fourteen days.

While in Salt Lake City the plaintiff corresponded with defendant. As a result of this correspondence and because of his not reaching South Dakota plaintiff received a letter from the defendant whereby the latter cancelled the remainder of the plaintiff's tour of the midwest for the year and terminated plaintiff's contract (Exh. A). The plaintiff thereupon commenced the action now before the court.

STATEMENT OF POINTS

Plaintiff-appellant submits the following points as reasons for seeking reversal of the lower court's ruling:

(1) The court erred in holding that the defendant, by and through R. W. Dill, the agent upon whom service of summons was made, was not doing business at the school where the service of summons was made, within the contemplation of Rule 17 (e), Utah Rules of Civil Procedure;

(2) The court erred in holding that the school at which defendant's agent was served was not a place of business within the contemplation of said Rule 17 (e);

(3) The court erred in holding that the cause of action did not arise out of the conduct of business done in the State of Utah, within the contemplation of said Rule 17 (e).

ARGUMENT

(I)

The court erred in holding that the defendant, by and through R. W. Dill, the agent upon whom service of summons was made, was not doing business at the school where the service of summons was made, within the contemplation of Rule 17 (e), Utah Rules of Civil Procedure.

This appeal will center around the interpretation to be given to Rule 17 (e), Utah Rules of Civil Procedure, which had just been adopted at the time of the service of summons involved. This rule was substantially identical with former Section 104-3-26.10, Utah Code Annotated, 1943 (1947) Laws:

> Rule 17 (e) *Action Against a Non-resident doing Business in this State.*

> When a non-resident person is associated in and conducts business within the State of Utah in one or more places in his own name or a common trade name, and said business is conducted under the supervision of a manager, superintendent, or agent, said person may be sued in his own name in any action arising out of the conduct of said business.

The manner of service of process in such cases is prescribed by Rule 4(e)(10):

> Rule 4(e)(10) *Personal service in this State.*
> Upon a natural person, non-resident of the State of Utah, doing business in this State at one or more places of business, as set forth in Rule 17(e), by delivering a copy thereof to the defendant personally or to one of his managers, superintendents or agents.

Inasmuch as no findings of fact and conclusions of law were prepared in support of the court's order, nor need they be prepared in view of Rule 52 (a), Utah Rules of Civil Procedure, which states " . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)," reference will be made to the court's memorandum decision at the close of the hearing, which formed the basis for the order quashing service of summons (Rec. 52-56, inc.)

The defendant is a non-resident natural person conducting business in the State of Utah under the common trade name of National School Asemblies. This the defendant admits (R. 10, 11), but he maintains that the only business done in Utah by him is through his booking agents who call at schools throughout the state in the fall of each year for the purpose

of booking engagements with the schools *as agents for the artists* (such as plaintiff). Throughout this brief we shall carefully point out that in actual practice it is the artists who are the agents for the defendant and not the defendant who is the agent for the artists as maintained by him.

In its memorandum decision the court (R. 53, 54) indicated that Jackson Junior High School in Salt Lake City, was not a place of business of the defendant nor was the agent doing business at that place. The ruling is not entirely clear, but, if so, the most that can be said is that part of it is immaterial. The discussion follows:

THE COURT: I will rule that he did not maintain a place out of which he did business, but I will rule that he did do business in more than one place.

MR. IVERSON: Will Your Honor rule on this point, that the service upon him at a school was a place of business within the contemplation of this statute so that we can have that taken care of?

THE COURT: I will rule that he was served in Salt Lake City, a place where he had done business.

MR. IVERSON: Well, will Your Honor rule this, that the service upon him at the school was a proper service because it was a place of business?

THE COURT: I will rule that it was not a place of business of the defendant.

MR. IVERSON: That it was not a place of business of the defendant within the contemplation of that section?

THE COURT: Well, I am going to leave that question to the Supreme Court as to whether it has to be a place of business of the defendant.

MR. IVERSON: Of course, if Your Honor rules on that, we will have something to present to the Supreme Court.

THE COURT: I will hold that he was served at Salt Lake City, a place where he had done business, but that he was not doing business within the contemplation of this statute in (Jackson Junior High), the place where the service was made.

(Further Discussion)

Let us examine the foregoing in the light of Rule 17(e). As can be seen, the Court in its first statement above indicated that it would hold the defendant " . . . did do business in more than one place." Then, in the last foregoing sentence, says, " . . . he was not doing business within the contemplation of this statute in . . . the place where service was made."

It can readily be seen that the defendant could not be doing business at Jackson Junior High School while being a non-resident except through one of his agents. Let us examine what occurred at that school on January 16, 1950, the date of service.

R. W. Dill, the person served, and his brother were giving an assembly program to the student body at Jackson Junior High School. They were replacing another program (Nevin Magicians) which the defendant's booking agents had previously booked for that date, but which was replaced for some reason. At any rate, the school was obligated to accept the

Dill Brothers by reason of the defendant's contract with the school which provided:

> ". . . If an attraction booked herein cannot perform as scheduled, another attraction of equal quality will be accepted by the sponors." (Record 18).

Of course, defendant will and has maintained that these contracts are those of the artists inasmuch as he merely runs an "employment agency" and that he is the agent and the artist is the principal. However, the facts clearly show that the defendant operates a large organization, having booked "nearly every school in the state of Utah" (Ex. C). It is interesting to note that defendant has told his talent: "If we did not do a terrific volume of business we would not be in business today . . ." (Exh. T).

Defendant cannot successfully maintain that the Dill Brothers were performing and fulfilling their own contract with the schools in view of his own very carefully worded affidavit in support of his motion to quash service of summons wherein he acknowledges (R. 11) that the bookings solicited by his agents . . . *"become a binding contract upon the defendant."* The contracts are those of the defendant alone!

That being the case the only conclusion that can be reached is that the Dill Brothers were performing a legally binding obligation of the defendant. Further, Mr. Dill's own testimony (R. 38) indicates that their story to the school at the commencement of a program was: "We are the Dill Brothers, Roy and Bob, and we have been sent by National School Assemblies." At the end of the program they would say, "We

are very happy to perform before you and very happy that National School Assemblies has made it possible for us to come your way." These statements were made according to instructions given to all talent (Exh. G—items 54 and 55).

If the fulfilling of a contract isn't "doing business" what is? The artists were consumating the very essence of the subject-matter of the contract. Furthermore, upon completing their performance they collected the amount due under the contract, kept their share and remitted the balance to the defendant at the end of the week. Receiving one's pay for a job well done is the final act of "doing business." In fact, their contract with the defendant (R. 14 (6)) requires such collection to be made as also do the "Suggestions to Talent" sent out by the defendant (Exh. R) which provide:

> "26. You are responsible for making collections in schools. In fact, that is one of the most important parts of your contract . . . "

Now, if the defendant still maintains that the Dill Brothers and other artists were merely fulfilling their own contracts which the defendant had secured for them as their agent how can he explain the fact that the Dill Brothers entered into their contract with the defendant on Sept. 9, 1949 (R. 14), the contract to be *effective not before January 1st,* 1950; but the contract under which they were giving a performance at the time of service of summons was entered into on *October* 20, 1948 (R. 18), nearly *a year before the circuit engaged them* and *more than a year before their contract became effective with the defendant?* (Supported by affidavits of school principals—R. 16-19, inc.; 21-23, inc.; Exh. G, Item 20). To say

that the defendant's booking agents made the contract as agents for a principal that was non-existent and unknown would seem to be stretching agency law to the limit. The simple truth is that the performers were in reality agents of the defendant despite his protestations to the contrary. The lower court has so held.

Plaintiff submits that the performance of the defendant's contract and the collection of the money therefor, part of which belonged to the performer and part of which belonged to the defendant (R. 55—Court's Memo. Dec.) constituted "doing business" by the agent. In fact, the events at the schools by the artists would seem to constitute the most active type of "doing business."

Most of the cases concerned with defining the phrase "doing business" have been those involving corporations. Black's Law Dictionary, Third Ed., p. 605, condenses the many cases on the subject, setting forth the following ingredients:

> " . . . The doing of business is the exercise in the state of some of the ordinary functions for which the corporation was organized . . . What constitutes 'doing business' depends on the facts in each particular case . . . The activities of the corporation, however, must represent a more or less continuous effort . . . or be of a systematic and regular nature .. . The transaction of a single piece of business is not enough . . ."

Here we have an organization which sends out agents each year to book engagements throughout the state of Utah. In performing under the contracts made a large group of artists traverse the state in waves, a new one arriving in the

wake of the one leaving. This continues from 28 to 32 weeks each year (Exh. C), or in all, the bulk of the school year. The activities are the culmination of the basic purpose of the organization, and are continuous, systematic and regular.

At this point it is well to point out that the defendant did not and has not now appointed an agent upon whom service of process could be made (R. 24 — Plaintiff's Affidavit of Effort to Locate Defendant) in accordance with Section 104-5-11.10, Utah Code Annotated, 1943 (as added by Laws of 1947), which requires that:

> "Every non-resident person doing business as provided in Section 104-3-26.10 (*now Rule* 17 (*e*), *Utah Rules of Civil Procedure*) shall file or cause to be filed a certificate, under oath, with the Secretary of the State of Utah, setting forth the name and place of business of his manager, superintendent, or agent upon whom service of summons may be had and shall file said certificate setting forth the name of said manager, superintendent, or agent on or before the 15th day of January in each year with the Secretary of the State of Utah." (Italicized portion added.)

It is quite apparent that our legislature inserted the foregoing provision into our law for the purpose of providing a method whereby any Utah citizen could serve summons upon a non-resident doing business in this state who operated from no given office, such as the defendant in this case. The unfortunate thing, however, is that no penalties are provided for those who do not register. Consequently, non-residents who operate in a manner similar to the defendant simply refuse to register since they will lose nothing thereby (there have only

been three non-residents who have designated agents with the Secretary of State according to the writer's inquiries) and, when sued, can instruct their real agents to keep away from process servers. Note the amusing and interesting manner by which this was done (Exh M—Letter to Donas):

3 October, 1949

Mr. and Mrs. John Dona
General Delivery
New Meadows, Idaho

Dear friends:

Next week you start your tour in the state of Utah.

During the entire time that you are in the State of Utah your "Power of Attorney" is not to be in effect.

Nothing contained in our "Suggestions to Talent," or any literature that might even tend to allow you to be agent of our bureau is in effect in the State of Utah.

If banks accept your signatures for cashing checks made payable to National School Assemblies they must do so at their own risk . . .

Please be most careful about this at all times in Utah.

Cordially yours,
R. E. Green, Director

If one is so fortunate as to serve one of these agents they then come into court on a special appearance, as here, and claim that no agency relationship exists, or that they are not "doing business" or that they are not doing business at any place.

Surely the legislature intended that non-resident persons doing business in the manner of the defendant were just the very ones to be included within the scope of Rule 17 (e).

(II)

The court erred in holding that the school at which defendant's agent was served was not a place of business within the contemplation of said Rule 17 (*e*).

The court, as heretofore pointed out, stated that it would hold that the agent was served " . . . in Salt Lake City, a place where he had done business," and that Jackson Junior High School, the place where service of summons was made was " . . . not a place of business of the defendant." (R. 54).

It should be remembered, however, that the statute (Rule 17 (e)) concerns itself with defendants who are doing business in one or more places by means of managers, superintendents or agents. It is not necessary that there be an established office out of which business is done, but only that business is done in one or more *places*. Nor does the place at which the business was done have to be a place of business of the defendant—which carries the connotation of an office.

If this court concludes that the agents were doing business at Jackson Junior High School, the place where service was made, then it must also conclude that that school was a "place" within the contemplation of Rule 17 (e). Plaintiff submits the common judgment would say that no person can do any volume of business unless it is done at a place or places. The very fact that the statute referred to "one or more places" indicates that the legislature had in mind just such organizations as that of the defendant who travel sans offices—always working out of a brief case.

Defendant may contend that Rule 4 (e)(10), previously referred to, makes it mandatory that service be made upon an agent at some office or fixed place of business. In support of such a view he would have to rely on the wording of the rule which follows: "Upon a natural person, non-resident of the State of Utah, doing business in this State at *one or more places of business . . .* " (Italics added). Plaintiff submits, however, that nothing contained in the foregoing phrase can be so broadly construed as to give an inference that the statute is so limited as to require that the places of business need be fixed in the form of an office or some stationary headquarters. But, should there be any doubt in the court's mind as to the meaning of the legislature concerning the requirement of a fixed place of business the plaintiff again calls attention to Section 104-5-11.10, discussed heretofore, which requires that non-residents doing business in this state designate an agent upon whom service can be made. If Rule 17 (e) were so narrow as to apply only to fixed offices or other forms of stationary headquarters of conducting business there would then be little need for Section 104-5-11.10 since locating an agent would be a simple matter.

Furthermore, Rule 4 (e)(10) relating to service does not limit or qualify Rule 17(e), nor can it since it is entirely subordinate to Rule 17 (e). In fact, Rule 4 (e)(10) refers to Rule 17 (e) directly: "Upon a natural person, non-resident of the State of Utah, doing business in this State at one or more places of business, *as set forth in Rule* 17 (*e*), . . ." (Italics added). Thus, it can be seen that Rule 4 (e)(10) deals only with the method of service and does not qualify or

alter in any respect the nature or manner of doing business, either as to place, method or locality.

If it be argued that the agent served must be associated with an office or some similar fixed place of business it would be well to compare the broad language of the Utah statute and that of a somewhat similar Iowa statute (Sec. 11,079, Iowa Code 1927, also 1931):

> "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any country other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

It can readily be seen that Rule 17 (e) is so written that its intent was to include situations like the one at issue. If it had intended that the "*place or places of business, as set forth in Rule* 17 (*e*) . . . " should be limited to an office or agency or other fixed place of business it would have been a very simple matter for the legislature to have qualified Rule 17 (e) as did the Iowa legislature. Since it did not it can only be presumed that it intended that the law should not be so narrow in its scope.

A simple analysis of the foregoing Iowa statute shows that the agent must be fixed and established at a definite location. But the distinction between the Utah and the Iowa statutes becomes apparent in view of Utah's law (104-5-11.10) requiring an agent to be designated for purposes of service whereas the Iowa statute has no need for such similar accom-

panying legislation since it specifies which agent can be served within the very terms of the given statute.

Plaintiff submits that the facts of this case come within the intent of the legislature in view of the wording of Rule 17 (e) in that service of summons was made upon an agent of the defendant doing business in one or more places.

(III)

The court erred in holding that the cause of action did not arise out of the conduct of business done in the State of Utah, within the contemplation of said Rule 17 (*e*).

The lower court in its memorandum decision made a holding (R. 52) as follows:

THE COURT: I think I ought to rule that this defendant had an agent in Utah but that the *cause of action* set forth does not arise out of the conduct—I also ought to hold that Green had done business in Utah but that the *cause of action* of Mr. Alward's did not arise out of the conduct of such business in Utah." (Italics added).

MR. DECKER: Your Honor, I would like to interrupt for one point. That statute doesn't talk about *cause of action.* It talks about *action.* (Italics added).

. . . . . .

The foregoing holding, in the opinion of the plaintiff, raises a point which is entirely immaterial to the case inasmuch as the court labored under the impression that the *cause of action* must arise in Utah. But what does Rule 17 (e) provide:

" . . . said person may be sued in his own name in any *action* arising out of the conduct of said business." (Italics added.)

Similarly, the Iowa statute:

" . . . service may be made on any agent . . . in all *actions* growing out of or connected with the business . . . " (Italics added).

Now when the legislature used the word "*action*" did it mean "*cause of action*"? We think not. Iowa has said that an "action," as the word in general statute of limitations, is a proceeding in court, and a "cause of action" is the fact or facts which establish or give rise to a right action. (*Dean v. Iowa-Des Moines Nat. Bank & Trust Co.,* 281 NW 714, 128 ALR 137).

One of the leading authorities in the United States pointing out the sharp distinction between the word "action" and the words "cause of action" is a Utah case. It is *DINSMORE et al. v. BARKER, DISTRICT JUDGE,* 61 Utah 332, 212 Pac. 1109. There, in pointing out the distinction the court said:

"The word 'action' is a generic term, having a broad and comprehensive application, and, in the absence of any restrictive word . . . means any legal proceeding in a court for the enforcement of a right or for the purpose of obtaining such a remedy as the law allows, or a judicial proceeding which, if conducted to a termination, will result in a judgment . . . "

The case of ALWARD V. GREEN is an "action." In other words, the lawsuit alone is sufficient to qualify under our statute. It is not necessary that the *cause of action* (which

might technically arise upon mailing a letter of termination in Los Angeles or Washington, D.C., and therefore have its technical situs there) arise in this state, but only that the *action* arise out of conduct of the defendant's business in this state.

As further authority pointing out the difference between the terms "action" and "cause of action:"

> "An 'action' is the means that the law has provided to put a 'cause of action' into effect."
> *Woods v. Cook,* 58 Pac. 2d 965 (California)
>
> "An 'action' is a means of redress of the legal wrong described by the words 'cause of action'."
> *Schueing v. State,* 59 Southern 160.
>
> "Under the federal rules, the term 'action' does not mean 'cause of action,' which is substituted by the word 'claim'."
> *Winkelman vs. GMC,* DC of NY 48 Fed. Supp. 490.

Inasmuch as the legislature provided that the action must arise out of the "conduct of said business" it provided a suitable standard by which a non-resident will not be submitted to lawsuits which arise out of business done in a state far beyond the confines of Utah, which might be the case if the technical situs of the cause of action is to be the place of suit. By the very nature of modern business conduct it is easily conceivable that situations may arise where the action might arise out of the conduct of business done within this state and yet the situs of the cause of action may arise in some other state. Thus, the defendant would contend that although the action may arise out of conduct of business done in Utah, the technical situs of the cause of action is in California and arose upon

placing the letter of cancellation in the mails. However, this argument is beside the point in view of the express wording of our statute.

No better discussion of this issue can be found than is pointed out in the case of *Caldwell v. Armour,* 43 Atlantic 517 (1899), before statutes similar to the Utah statute were considered constitutional, which stated:

> "It has been suggested that we may hold the statutory mode of service upon non-resident citizens valid only in cases like the present one, where the cause of action accrued in this state. The legislature has not so limited the operation of the statute, and the courts have no power to do so. The statute is general and applies equally to all cases of non-residents doing business in this state, irrespective of the fact that the cause of action accrued here or elsewhere. To hold this mode of service upon a non-resident good where the cause of action accrued in this state, and bad where the cause of action accrued out of the state, would be wholly unwarranted by the statute, and would be legislation by the court, and not construction."

Our court has heretofore held the statute at issue to be constitutional in the case of *Wein v. Crockett,* 195 Pac. 2d 222 (Utah, 1948). In that case Justice Latimer in the majority opinion indicated in several places that if a cause of action arose in Utah " . . . witnesses will be readily available." But, as previously indicated, the reverse might be true, as would be the case if a letter canceling a contract were mailed while traveling on a train in say, Illinois, 1500 miles from any state connected with the transaction out of which the action arose. Actually, witnesses will be more readily available in the state

where the transactions out of which the action arises should occur.

In contrast to the case at bar an entirely different set of facts presented themselves in the Wein case. There was no occasion to bring out the distinction between the terms "action" and "cause of action" in that case. In fact, the authorities cited in support of the constitutionality of a statute such as ours failed to note the distinction, and used the terms interchangeably. In those places where Justice Latimer indicated that the situs of the cause of action had anything to do with the case his statements were purely dicta and not significant since there was no reason in the Wein case for making a distinction between the terms. Actually, his statements tending to point out the distinction were just as numerous, such as the following: "By voluntarily doing business in this state, a nonresident impliedly consents to being sued upon causes of action arising out of the transaction of business in this state . . .," thus asserting that the cause of action need only arise out of business done here, not that the cause of action must arise here. Similar statements are found elsewhere in the decision.

. . . . . .

It appears that the fundamental issue of this case is simply this: Did the action arise out of the conduct of business in the State of Utah within the meaning of Rule 17(e)?

The plaintiff, Mr. Alward, submits that he was engaged in the conduct of defendant's business in the state of Utah during the 10 or so days immediately preceding the receipt

of the letter terminating the contract between him and the defendant.

At the time the alleged cause of action arose Mr. Alward carried with him a power of attorney (Exh. F) which reads as follows:

1 September 1948

POWER OF ATTORNEY

This authorizes the bearer:

Mr. Benjamin B. Alward

who has countersigned below, to serve as business representative for National School Assemblies; to make all settlements, and to endorse and cash any checks made payable to National School Assemblies.

This authorization is good until June 10, 1949.

NATIONAL SCHOOL ASSEMBLIES

By (s/d) *R. E. Green*

R. E. Green, Director

Countersigned: (s/d)
Benjamin B. Alward
(Notarized)

This power of attorney was received under cover of a letter (Exh. E) which reads in part as follows:

TO THE MANAGER OF EACH ATTRACTION

"Herewith is your "Power of Attorney."

This gives you the *authority to do business for* National School Assemblies; to sign or endorse and cash checks made out to National School Assemblies, and otherwise *to represent the organization in any business dealings . . .* " (Italics added).

Plaintiff operated according to the terms of a contract (Exh. B) under which he was to deliver performances in accordance with bi-weekly schedules to be delivered to him by Mr. Green, and under which he was otherwise to perform *"as directed."* He was directed in the performance of his duties by a list of "Suggestions to Talent" (Exh. G) and periodic "Special Bulletins to Talent" (Exh. S and T). The "Suggestions to Talent" begin with the following pertinent sentence which indicates that the defendant considered plaintiff's activities while in Utah as the "conduct of business:"

> "In order that the Booking Bureau and the Talent Attractions may better work in harmony and more effectively serve the schools successfully and with a minimum of lost motion and friction, we offer the following suggestions for the *conduct of business."* (Italics added.)

Among the points relating to "conduct of business" as thereinafter specified are Schedules (items 1-4), Mail Points (items 5-8), Cancellations (items 9-15), Making Dates Assigned (item 16), Telegrams (items 17-18), Publicity (items 20-24), Booking Additional Dates (item 25), Collections (items 26-28), Change in the Hour of Assignment (items 29-30), Conduct (items 35-6), Deductions for Missed Dates (items 38-40), Remittances (item 56) and others. Apparently Mr. Green, the defendant, felt that the making of collections and remittances, the fulfilling of schedules and means and method of travel, the sending and receiving of letters and telegrams, the booking by talent of additional dates, means of publicity, travel and preparedness for winter (items 34 and 37), missed dates due to being snowbound, the handling of

changes in assignments, etc., as a part of the "conduct of his business." As such the plaintiff's activities in Utah were conduct of business.

The "Special Bulletins to Talent" refer to "people on *weekly salary,*" saying that "no talent would expect that we pay salary for that week" (a week missed due to floods or snowblocked roads), and that "*we wish we could pay you* all we think you are worth . . ." and that "three of four-people companies are not *hired* for the same that single or double attractions *are hired.* (Italics added—Exh. T). Similar statements are found in Exhibits N, O, and S. Mr. Green apparently considered the talent as his hired employees, to be paid weekly salaries out of his receipts. Consequently, plaintiff was an agent of the defendant—probably an employee.

It seems clear from the evidence taken at the hearings (Exh. A-A and Record 47-50, inc.) and from the exhibits that Mr. Alward was acting as agent and conducting business for Mr. Green during the days immediately preceding the receipt by him of the letter terminating his contract. Specifically, Mr. Alward attempted to find his way through the snowblocked roads to fulfill his assignments in South Dakota, he received and sent mail and telegrams necessary to the business of Mr. Green, he made a remittance (Exh. H), he had telephone conversations with Mr. Green concerning the business —all done while in the State of Utah. Mr. Alward notified Mr. Green by mail and by telephone of the difficulty he was encountering in getting through to the east over the snowblocked roads and of the improbability of success. Mr. Green expressed dissatisfaction with Mr. Alward's efforts to get

through and held a heated telephone conversation with the plaintiff in which the latter was told, in substance, to make sure that he got out of town by Friday (Exh. A-A). Mr. Alward received a letter of termination (Exh. A) which was posted before "Friday" while still in Salt Lake City. The defendant failed to send further bi-weekly schedules as called for in the contract, making it impossible for the plaintiff to have performed had he could or would, and this lawsuit resulted from the happenings.

It can be seen that the controversy arose out of Mr. Alward's alleged misconduct of defendant's business while in Utah. The plaintiff's contention is that the defendant unjustifiably terminated and cancelled their contract, while the defendant contends, or must contend, that the termination and cancellation was justified. This problem must be determined upon the merits of the matter.

After defendant had failed to provide schedules as called for in their contract and had notified plaintiff that their contract was terminated suit was brought in Utah because of the obvious convenience to the plaintiff, who customarily resides in Utah when not lecturing. The witnesses to the plaintiff's efforts to find a way through the snowblock, the witnesses to the conditions of the roads and the witnesses as to weather conditions are in Utah, and their testimony can much more conveniently be had in Utah than in any other state.

The heart of the controversy necessarily boils down to a question of whether Mr. Alward's failure to make his arrangements was justified by the road and weather conditions or

was Mr. Green's failure to further perform under their contract and his termination thereof justified by circumstances surrounding Mr. Alward's refusal or failure to make his assignments? The answer is to be found in the testimony of Utah witnesses and the action should therefore properly be tried in Utah insofar as determining the case on its merits is concerned.

. . . . . .

A further point raised at the hearing in the lower court concerned itself with whether the legislature intended to exclude suits by Utah agents against non-resident principals from the benefits of Rule 17(e). Plaintiff submits that such an intent can not be read into the statute in absence of some express statement or qualification of the statute. Section 104-5-11.10, if complied with, permits any Utah resident, whether agent, employee or otherwise, to obtain personal service in this state upon a non-resident. Surely the legislature intended to extend the benefits of the law to all Utah residents, irrespective of whether or not they be agents or employees of the defendant.

Plaintiff submits that the exhibits on file in this action, standing alone, present the complete picture as effectively as volumes of written brief in support of his contention that this situation comes within the purview of Rule 17(e).

SUMMARY

Inasmuch as the constitutionality of the statute was decided affirmatively in the case of Wein v. Crockett, 195 Pac.

2d 222 in 1948, the sole issue involved is whether or not the facts of this case come within the purview of Rule 17(e).

In recent years statutes similar to our Utah statute have become very numerous. As stated in 10 ALR 2d 200:

> " . . . Today in most, if not all, states, jurisdiction of a non-resident defendant, corporate or otherwise, may be acquired by substituted service upon his agent or employee if the defendant is doing business within the forum state . . . "

These statutes, though worded differently, are basically similar to our Utah statute. However, one of the most marked distinctions existing among the various acts is that some, like Iowa, allow service to be had upon non-residents only when the agent is doing business out of an office or agency, but other statutes as are found in Utah, New York, Mississippi and other states have been held constitutional even though the business done by the non-resident need not be conducted from any fixed office or agency. Mississippi recently held a similar statute constitutional in the case of Condon v. S. (1949), 38 Southern 2d 752.

It must be borne in mind that each statute differs in certain minor respects from those of other states and, consequently, the facts of each case must be analyzed with respect to their application to the particular statute. This is the appellant has attempted to do throughout the preceding portion of this brief.

Having heretofore argued the points that the defendant was doing business by means of agents and in one or more

places and that this lawsuit arose out of the conduct of business done in Utah it would be interesting to investigate the trend of recent cases. To this time the cases on the subject of what constitutes doing business are, as stated in 10 ALR 2d 200, " . . . extremely few . . . "

In the case of *Melvin Pine & Co. v. McConnell,* 273 App. Div. 218, 76 NYS 2d 279, 10 ALR 2d 194, affd. 298 NY 27, 80 NE 2d 137, the agents served in a breach of contract action were manufacturer's agents for a co-partnership having its principal place of business and manufacturer in Ohio. The New York statute, similar to ours, reads in part as follows:

> "When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who, at the time of service, is in charge of any business in which the defendant or defendants are engaged within this state, . . . "

The agents solicited orders as selling agents for the defendant, one receiving a salary plus a commission and the other being on a strict commission basis, and both being " . . . independent contractors to some extent." Orders solicited had to be accepted at the factory in Ohio before they became binding. The partnership did not maintain a bank account, account books, records or office space in New York state. The sales representatives maintained their own offices at their own expense and represented other firms as well as the defendant. Checks drawn to the agent's own order were

deposited in a special account and the proceeds remitted to the defendants after deduction of shipping and other charges.

Upon the foregoing set of facts the New York court held the defendants to be doing business within the meaning of the statute and that service upon the sales representatives conferred jurisdiction of the partners. In handing down its decision the court said:

> "In cases of this sort it is the cumulative significance of all the activities conducted in this jurisdiction rather than the isolated effect of any single activity that is determinative on the question of doing business in the state . . . "

The New York Court of Appeals, in affirming the desision, said:

> "Defendants' local activities amply satisfied the long-recognized test of what constitutes engaging in business, as laid down in the decisions of this court . . . It is unnecessary at this time, to say whether and to what extent that test may be relaxed in reliance upon the constitutional principles recently announced by the Supreme Court in International Shoe Co. v. Washington (326 US 310)."

In the case of *International Shoe Co. v. Washington,* 326 US 310, 66 C. Ct. 154 (1945) 161 ALR 1049, the United States Supreme Court, speaking through Mr. Chief Justice Stone, held that service of process upon traveling salesmen who merely solicited orders which were not binding until accepted by the home office in St. Louis subjected the corporation to the jurisdiction of the State of Washington for the purpose of recovering contributions to the state unemployment compensation fund,

and that the corporation was doing business in and physically present in the state. Furthermore, such action did not violate the due process clause of the Fourteenth Amendment.

In that action the defendant shoe company appeared specially on grounds almost identical to those raised by the defendant in this case, particularly specifying that it had no office in Washington and that its salesmen were on a commission basis only. In response to such argument Mr. Chief Justice Stone said:

> "Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure."

In the case of Wein v. Crockett, supra, the law upholding in personam jurisdiction of non-residents doing business within this state was amply and carefully discussed and therefore need not be cited in this brief.

CONCLUSION

The plaintiff submits that, in view of the facts of this case, as proved by the evidence and in view of decided law on the subject, defendant's activities are of such nature that all of the requirements of Rule 17(e) are fulfilled and that he should be required to answer the complaint filed against him in the Third Judicial District Court of the State of Utah.

Respectfully submitted,

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